

**MINUTES**

**MONTANA SENATE  
58th LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON BUSINESS AND LABOR**

**Call to Order:** By **CHAIRMAN DALE MAHLUM**, on March 21, 2003 at 9 A.M., in Room 422 Capitol.

**ROLL CALL**

**Members Present:**

Sen. Dale Mahlum, Chairman (R)  
Sen. Mike Sprague, Vice Chairman (R)  
Sen. Sherm Anderson (R)  
Sen. Vicki Cocchiarella (D)  
Sen. Kelly Gebhardt (R)  
Sen. Ken (Kim) Hansen (D)  
Sen. Sam Kitzenberg (R)  
Sen. Glenn Roush (D)  
Sen. Carolyn Squires (D)

**Members Excused:** Sen. Bob Keenan (R)  
Sen. Don Ryan (D)  
Sen. Fred Thomas (R)

**Members Absent:** None.

**Staff Present:** Sherrie Handel, Committee Secretary  
Eddy McClure, Legislative Branch

**Please Note.** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing & Date Posted: HB 438, 2/24/2003; HB 482,  
2/28/2003  
Executive Action: HB 438

**{Tape: 1; Side: A}**

HEARING ON HB 482

Sponsor: REPRESENTATIVE GARY FORRESTER, HD 16, GARDINER

Proponents: Bob Pavlovich, IBEW 233; Carl Schweitzer, American Sub-Contractors Association of Montana; Earl Hanson, JTL Group, Inc.; Ed Murphy, Frontier West LLC; Chuck Olson, James Talcott Construction; Dennis Iverson, Montana Contractors Association; Margaret Morgan, Independent Electrical Contractors; Mick Brown, Brown Plumbing

Opponents: Bob Vogel, Montana School Boards Association

Informational Witnesses:

Brett Dahl, Department of Administration

Tim Reardon, Department of Transportation

Opening Statement by Sponsor:

REPRESENTATIVE GARY FORRESTER, HD 16, GARDINER, stated HB 482 is a bill to change the indemnification insurance clause for construction contracts. While it is a complex issue, it is one that affects a great deal of contractors and sub-contractors across the state.

Proponents' Testimony:

Bob Pavlovich, IBEW 233, offered his support for HB 482.

Carl Schweitzer, American Sub-Contractors Association of Montana, stated his organization asked REP. FORRESTER to bring this bill before the legislature. Mr. Schweitzer distributed a copy of an indemnification agreement, EXHIBIT (bus60a01). He gave an example of a construction contract between and owner and a general contractor. The general contractor will sign a contractor with sub-contractors to build a project. One of the provisions seen in contracts is an indemnification clause, which means you are indemnifying someone for your poor work or mistakes. It states that if a person is negligent on the job, then he is not accountable for his negligence. If a general contractor has a sub-contractor sign this type of clause and a negligent act happens and perhaps they're both 50 percent responsible for that negligence, this clause puts all of the responsibility onto the sub-contractor. He doesn't believe that is fair. Each person should be responsible for their own negligence. Mr. Schweitzer went on to explain each section of the bill. He then said the cost of insurance is becoming prohibitive in the construction

business due to this type of indemnification. He asked the committee to take a hard look at this issue and vote in favor of it.

**Earl Hanson, JTL Group, Inc.,** stated his company is in the position of writing a tremendous number of general contracts. He said he wrote the contract that the state has used over the last ten years. They don't put in the provision of sole liability, but they use the type of thinking the sub-contractors association wants in this bill. He encouraged the committee to approve the bill and follow in the steps of other states who have recognized the unfairness in the present law and went on to list the many states that have already changed their laws. **Mr. Hanson** further explained the passage of this bill would reduce the insurance costs of sub-contractors and even general contractors.

**Ed Murphy, Frontier West LLC,** supported the passage of HB 482, which he feels would bring fairness to contracts, would eliminate unreasonable indemnity terms, would put all parties on an equal playing field as well as make all parties responsible for their own negligence. Most of his company's contracts are with the Montana Department of Education. They are only responsible when they are 100 percent negligent. If there were a 100-day delay on a project, and the state caused a 99-day delay by its negligence, and the contractor or sub-contractor were one day late, the state would be totally immune from liability for breach of contract. The state would assert that the result was not solely caused by a negligent acts or omissions or misconduct of its employees. **Mr. Murphy** said that shows the ridiculous nature of such a provision. He asked the committee to help make sure unreasonable indemnity terms are eliminated in contracts. He closed by saying it is all about fairness.

**Chuck Olson, James Talcott Construction,** stressed that, as a general contractor, when they sign a contract, they are forced by contract to pass the issues of indemnification onto their sub-contractors. They don't think that indemnifying someone else for their actions is fair and equitable situation for everyone involved. He asked the committee if they would sign a contract with anyone making you responsible for their actions.

**Dennis Iverson, Montana Contractors Association,** offered his organization's support of HB 482 as well as that of **Byron Roberts, Building Industry Trades Association.** **Mr. Iverson** reminded the committee that both bills being heard this day had been heard last session and the session before. His association and the sub-contractor association disagreed strongly on the bills. He related that what happened in the interim was that his association and the sub-contractors worked out their differences

and the result is HB 482. He strongly support the bill and pointed out that if everyone on the job is indemnified, then the whole project is over insured, which translates to a cost added into the project. He felt it was more than a fairness issue, but also a good money-saving issue.

**Margaret Morgan, Independent Electrical Contractors**, which are both sub-contractors and businesses in Montana. They want to be responsible for their actions, but not anyone else's. She pointed out that it is very much a money issue. Insurance is a tremendous issue. Passage of this legislation would be a positive step toward solving it.

**Mick Brown, Brown Plumbing**, explained that insurance is one of the biggest issues facing everyone in the business today. He was glad to see the support of the industry for the bill as did he.

#### **Opponents' Testimony:**

**Bob Vogel, Montana School Boards Association**, expressed his organization's concerns over the implications of the bill for school districts in Montana. They are defined as a governmental entity in the bill. He didn't raise strong objections to the bill but didn't want to see unintended consequences for school districts in the process.

#### **Informational Witness Testimony:**

**Brett Dahl, Department of Administration**, notified the committee that there is a revised fiscal note on this bill. Initially, when this bill went through the House, the definition of governmental entity excluded the state; however the bill was intended to also apply to state government.

**Tim Reardon, Department of Transportation**, estimated that the owner's protection policy cost was about \$250K. He based that amount on a \$240M to \$250M construction program.

#### **Questions from Committee Members and Responses:**

**SEN. VICKI COCCHIARELLA** wanted to know the intention of the House when they proposed the section **Mr. Schweitzer** asked the committee to take off. **Mr. Schweitzer** gave some history on the progress of the bill from the House and the Senate. The House Judiciary Committee took a look at it after Business and Labor had approved it.

**{Tape: 1; Side: B}**

His feeling was that this whole thing would open up a lot of mischief with no one understanding what it means. **SEN.**

**COCCHIARELLA** asked if he had seen the new fiscal note. **Mr. Schweitzer** noted that there might be some insurance savings due to the fact that you wouldn't have to buy a rider on the policy. Everyone would be responsible for their own negligence.

**SEN. MIKE SPRAGUE** asked **Mr. Vogel** if he had talked to **Lance Melton** about the legal ramifications. **Mr. Vogel** spoke with him briefly and will have **Mr. Melton** brief him later. The listing of schools as a government entity had not been caught and neither **Mr. Vogel** nor **Mr. Melton** had testified in the House.

**SEN. SPRAGUE** asked **Mr. Reardon** for a third party indemnification explanation. **Mr. Reardon** stated that the problem for sub-contractors is that the insurance industry is forcing the prime contractor to pass down that same language on indemnification to the sub-contractors. Small contractors are unable to get the coverage at a decent cost or not at all.

**SEN. SPRAGUE** asked **Mr. Dahl** if he believes there is an overlapping consequence and fairness issue here. **SEN. SPRAGUE** gave the example of a small contractor coming on at the end of a multi-million dollar contract to do some work for a few thousand dollars and having to have insurance for the whole amount of the project. **Mr. Dahl** replied that the difficulty with construction contracts is the activities that give rise to the liabilities are varied. With the current system and the way the state is insured, they are covered by the contractor's insurance policy. It had never been brought to his attention that there was a problem with any sub-contractors or contractors or insurance costs. He attributed the problem to 9-11, nationwide claims for mold and other issues as well as a falling stock market with insurance companies being heavy investors in it.

**Closing by Sponsor:**

**REP. FORRESTER** discussed some of the items in the revised fiscal note, which he received late yesterday. He is a small drywall contractor in Billings and related his experience with insurance and indemnification issues. At the present time, it is almost impossible to obtain this type of insurance in Montana. **REP. FORRESTER** stated this is a fairness bill.

HEARING ON HB 438

Sponsor: REPRESENTATIVE GARY FORRESTER, HD 16, GARDINER

Proponents: Carl Schweitzer, American Sub-Contractors Association of Montana; Chuck Olson, James Talcott Construction; Dennis Iverson, Montana Contractors Association; Margaret Morgan, Independent Electrical Contractors Association; Mick Brown, Brown Plumbing and Montana Plumbing Contractors Association

Opponents: None

Opening Statement by Sponsor:

REPRESENTATIVE GARY FORRESTER, HD 16, GARDINER, said HB 438 was introduced at the last legislative session, but has been changed. He thought it was done right this time.

Proponents' Testimony:

Carl Schweitzer, American Sub-Contractors Association of Montana, distributed a Construction Payment Timetable, **EXHIBIT**(bus60a02), and said this bill was brought back after introduction in the last legislative session. The contractors and sub-contractors got together with **REP. FORRESTER** and worked hard to produce this bill. It amends the payment bill passed four sessions ago and adds some more detail to it that the contracting industry felt was important to have for sub-contractors to be paid on time. One of the biggest issues a contractor faces is timely payment.

*{Tape: 2; Side: A}*

It's one of the reasons sub-contractors formed the American Sub-Contractors Association of Montana. **Mr. Schweitzer** shared that SB 438 was patterned after successful Arizona legislation, which caused a 28-day reduction in the amount of time a contractor had to wait for his money. **Mr. Schweitzer** went through each section of the bill with the committee.

**Chuck Olson, James Talcott Construction**, stated his agreement with what **Mr. Schweitzer** had shared with the committee. He noted that contractors and sub-contractors do not have the means to bankroll themselves for any extended period of time. All he asked for was the committee's consideration in passing this bill.

**Dennis Iverson, Montana Contractors Association**, strongly supported the bill and expressed appreciation to **REP. FORRESTER** and the sub-contractors for their hard work on the bill. He also expressed the support of **Byron Roberts, Montana Building Industry Association**.

**Margaret Morgan, Independent Electrical Contractors Association**, rose in support of the legislation. She shared a story of a member in Billings who lost \$10K. He was a sub-contractor on a project and couldn't get paid. Ultimately, the contractor left the state. This bill would have helped him and would have given him some recourse. Many businessmen cannot take this kind of financial impact. She encouraged the committee's support.

**Mick Brown, Brown Plumbing and Associated Plumbing and Heating Contractors of Montana**, concurred with previous testimony. Cash flow is very important to them. He stated he would appreciate the support of the committee.

**Opponents' Testimony: None**

**Questions from Committee Members and Responses:**

**SEN. KEN HANSEN** asked **Mr. Schweitzer** if the bill included any federal contracts to which **Mr. Schweitzer** replied state laws cannot be applied to federal jobs.

**SEN MIKE SPRAGUE** wanted to know if the bill applied to a dollar amount. **Mr. Schweitzer** replied that, with regard to residential construction, it applies to any home over \$400K total project cost.

**SEN. ROUSH** questioned **Mr. Schweitzer** about his organization coming back next session to change this legislation again. **Mr. Schweitzer** assured **SEN. ROUSH** and the committee he did not plan on coming back and changing it.

***{Tape: 2; Side: B}***

**SEN. VICKI COCCHIARELLA** commented on how pleased she was to see contractors and sub-contractors come together to solve this problem and come up with this bill.

**Closing by Sponsor:**

**REP. FORRESTER** thanked the committee for a good hearing. He advised **SEN. ROUSH** and the committee that all sub-contractors are asking for is fairness. This bill gives a contractor the ability

to collect his money in a timely fashion or allow him to stop work on the job without the fear someone else will be hired and it will come out of the contractor's pocket. When they came before this committee two years ago, they had many associations oppose the bill. County commissioners did not like the bill at first, but now understand it and don't have a problem with it.

**EXECUTIVE ACTION ON HB 438**

**Motion/Vote: SEN. COCCHIARELLA moved that HB 438 BE CONCURRED IN. Motion carried 8-0. SENATOR GLASER WILL CARRY THE BILL.**



**ADJOURNMENT**

Adjournment: 10:07 A.M.

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SEN. DALE MAHLUM, Chairman

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SHERRIE HANDEL, Secretary

DM/SH

**EXHIBIT (bus60aad)**